Google Inc. et al v. Egger et al Doc. 333 Att. 16

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--x
CENTER FOR CONSTITUTIONAL RIGHTS, TINA M. FOSTER, GITANJALI S. GUTIERREZ, SEEMA AHMAD, MARIA LAHOOD, RACHEL MEEROPOL,

Plaintiffs,

v.

GEORGE W. BUSH, President of the United States; NATIONAL SECURITY AGENCY, LTG Keith B. Alexander, Director; DEFENSE INTELLIGENCE AGENCY, LTG Michael D. Maples, Director; CENTRAL INTELLIGENCE AGENCY, Michael v. Hayden, Director; DEPARTMENT OF HOMELAND SECURITY, Michael Chertoff, Secretary; FEDERAL BUREAU OF INVESTIGATION, Robert S. Mueller III, Director; JOHN D. NEGROPONTE, Director of National Intelligence,

Defendants.
--x

Case No. 06-cv-313 (GEL) (KNF)

ECF Case

BRIEF OF AMICI CURIAE OF DR. LOUIS FISHER AND DR. WILLIAM G. WEAVER IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' ASSERTION OF THE STATE SECRETS PRIVILEGE

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INTEREST OF AMICI CURIAE[1]

Louis Fisher is Specialist with the Law Library of the Library of Congress and previously served as Senior Specialist in Separation of Powers with the Congressional Research Service of the Library of Congress from 1970 to March 2006. He is the author of numerous books and articles on constitutional law and is frequently invited to testify before Congress. Dr. Fisher has conducted extensive research on the State Secrets Privilege and wrote the forthcoming book entitled *In the Name of National Security: Unchecked Power and the* Reynolds *Case* (August 2006). William G. Weaver is an associate professor of political science at the University of Texas at El Paso and senior adviser to the National Security Whistleblowers Coalition. Dr. Weaver has extensively researched the State Secrets Privilege and has a forthcoming co-authored book entitled *Presidential Secrecy and the Law* (Spring 2007) and a published study on the Privilege's development and use. Based upon their expertise, Drs. Fisher and Weaver have an interest in providing the Court with a fuller understanding of the history of the State Secrets Privilege and its relationship to judicial independence, the rule of law, constitutional limits, and other issues in this case. The views expressed in this brief are those of Drs. Fisher and Weaver, and their institutional affiliations are provided for identification purposes only.

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

In response to newspaper disclosures of a previously secret program of eavesdropping conducted by the National Security Agency (NSA), a number of lawsuits challenged the constitutionality and legality of the Administration's program. The Administration responded by

[1] *Amici curiae* certify that no party opposes the filing of this brief. *Amici* state that no counsel for any party has authored this brief in whole or in part.

claiming that the State Secrets Privilege operates as an absolute bar to litigation the Administration determines would be harmful to national security and national interests. The Administration relies primarily on the Supreme Court ruling in *United States* v. *Reynolds*, 345 U.S. 1 (1953), and the Administration's interpretation of presidential powers available in Article II of the Constitution, particularly the doctrine of "inherent powers."

That line of analysis is fundamentally flawed. Constitutional principles do not support the government's argument that the President has broad inherent authority to eavesdrop on American citizens, particularly when Congress has already established a statutory process through the Foreign Intelligence Surveillance Act (FISA) that was meant to provide the exclusive means of conducting national security surveillance and to do so with the supervision and oversight of a federal court, the Foreign Intelligence Surveillance Court (FISC). To automatically accept claims by an interested party (in this case the government), and treat them as absolute, would do great damage to the reputation and integrity of the federal judiciary. It would repudiate any pretense to judicial independence, objectivity, the weighing of evidence, or fairness to a private litigant. This is especially true in the face of increased use of the Privilege over the past several decades. William G. Weaver & Robert M. Pallitto, "State Secrets and Executive Power," 120 *Pol. Sci. Q.* 85, 101-02 (2005).

In his treatise on evidence, John Henry Wigmore recognized that the State Secrets Privilege exists, but he concludes that the branch responsible for determining the necessity of the Privilege is the judiciary, not the executive: "Shall every subordinate in the department have access to the secret, and not the presiding officer of justice?" 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2379 (3d ed. 1940). A court that "abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege." *Id*.

ARGUMENT

I. The Government Improperly Relies on British Precedent to Support the State Secrets Privilege as an Absolute Bar on Access to Requested Documents.

The government frequently has cited British precedents and court rulings to justify the State Secrets Privilege in the United States. In its brief to the Supreme Court in *United States* v. *Reynolds* (1953), the government urged the Court to give "great weight" to the decision by the House of Lords in *Duncan* v. *Cammell, Laird* (1942), holding that "ministers have sole power to decide whether disclosure should be made of departmental documents." Brief for the United States, United States v. Reynolds, U.S. Supreme Court, October Term, 1952, No. 21, at 11. According to the brief, "the sole arbiter of when the public interest so requires is the cabinet minister who heads the department to which the documents belong." *Id.* at 39. As explained in Section II below which analyzes the *Reynolds* case, there is great risk in relying on a governmental system that is not characterized by separation of powers and checks and balances; the government's brief mischaracterized the *Duncan* decision; and the House of Lords later disowned the legal reasoning in *Duncan*.

Crown Privilege, which became the "state secrets privilege" when it migrated to the United States legal system, grew out of English royal prerogatives. These prerogatives were claimed by the crown to be beyond the reach of law, and the crown, as the "fountain of justice," was said by a fiction to always act in the public interest. *E.g.*, 1 W. Blackstone, *Commentaries on the Laws of England* 266, 269 (London: A. Strahan & W. Woodfall, 12th ed., 1793-95). William Blackstone defined the term "prerogative" as that which is "out of the ordinary course of the common law" and refers to "those [powers] which [the crown] enjoys alone . . . and not to those which [it] enjoys in common with any of [its] subjects." *Id.* at 232.

The prerogative of crown privilege to prevent disclosure of sensitive information was not generally discussed or recognized in early works and compilations concerning royal prerogatives. For example, nothing in the *Prerogativa Regis*, 17 Edw. II, Stat. 1 (1324), relates to a privilege to protect information or secrets of state, and none of the standard law texts of the 17th century cite to a prerogative against disclosure of information or the protection of state secrets. Despite this absence of discussion of a privilege against disclosure in law texts and other publications, this power was considered implicit in the crown's prerogatives concerning matters of state and foreign affairs. 1 Blackstone, *Commentaries*, at 245-53.

Nathaniel Bacon noted that "It may be the great Lords thought the Mysteries of State too sacred to be debated before the vulgar, lest they should grow into curiosity." N. Bacon, *An Historical and Political Discourse of the Laws and Government of England*, Collected from some manuscript notes of John Selden, Esq. (London: Daniel Browne & Andrew Millar, 1739). In 1571, Queen Elizabeth I warned members of Parliament that "they should do well to meddle with no matters of State, but such as should be propounded unto them, and to occupy themselves in other matters, concerning the Common-Wealth." Journal of the House of Lords, April 1571, in *The Journals of All the Parliaments, During the Reign of Queen Elizabeth* (1682), URL: <http://www.british-history.ac.uk/report.asp?compid=43682> Accessed June 11, 2006. Likewise, James I in 1620 told Parliament "We discharge you to meddle with Matters of Government or Mysteries of State." 2 *Proceedings and Debates of the House of Commons, in 1620 and 1621*, at 326 (Oxford: Clarendon Press, 1766). He lectured Parliament and the public in a proclamation:

> . . . forasmuch as it comes to Our eares, by common report, That there is at this time a more licentious passage of lavish discourse, and bold Censure in matters of State, then

> hath been heretofore, or is fit to be suffered, Wee have thought it necessary, by the advice of Our Privie Councell, to give forewarning unto Our loving Subjects, of this excesse and presumption; And straitly to command them and evry of them, from the highest to the lowest, to take heede, how they intermeddle by Penne, or Speech, with causes of State, and secrets of Empire, either at home, or abroad, but containe themselves within that modest and reverent regard, of matters, above their reach and calling, that to good and dutifull Subjects appertaineth.

Early Stuart Libels, URL: http://www/earlystuartlibels.net/htdocs/spanish_match_section/No.html> Accessed June11, 2006.

The earliest discussions of what would become the State Secrets Privilege grew out of parliamentary and legal contretemps concerning the crown's power to detain citizens without showing a legal cause for such detention. Courts in the time of Charles I could only acquire jurisdiction to bail prisoners or rule in habeas corpus through the state production of a legal cause for the detention of the prisoner in question. If the crown refused to show cause for a prisoner's detention it was argued by the crown, and seemingly accepted in law, that courts had no jurisdiction with which to act in the matter. For example, in the *Case of the Lords Presidents of Wales and York*, the court stated that "the defendants, by law, may in all courts plead to the jurisdiction of the court, but how can they do so when no man can possibly know what jurisdiction they have: concerning matters of state, which are *arcana imperii* [mysteries of state], it is meet they should be kept *sub sigillo concilii* [under seal; in strict confidence], and in secret." 12 Co. Rep. 50, Circa 1607, at 56. In *Ruswell's Case*, the court held "that a return that one is committed *per Mandatum Privati Concilii Domini Regis* [by order of King's Council] was good enough, without returning any Cause; for it is not sit [fit?] that *Arcana Imperii* [mysteries of state] should be disclosed." 3 Journal of the House of Lords, 1620-1628 (Apr. 19, 1628).

Despite frequent failures of courts to accept jurisdiction over crown-ordered detentions, Magna

Carta and an Act of Parliament in 1363 showed crown acquiescence to the claim that no subject could be detained without showing cause in law. Paragraph 39 of the Great Charter states: "No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." In 1363, the crown admitted that it had no legal authority to order detentions by special directive. Parliament in that year petitioned Edward III "that the great Charter, and the Charter of the Forest, and other Statutes made in his time, and the time of his Progenitors, for the profit of him, and his Commonalty, be well and firmly kept; and put in due execution, without putting disturbance, or making arrest contrary to them by special command, or in other manner." 36 Edw. III, Rot. Parl., No. 9. The King did not object to the petition, and in assenting to its features made it an Act of Parliament by declaring, "Our Lord the King, by the assent of the Prelates, Dukes, Earls, Barons, and the Commonalty, hath ordained and established that the said Charters and Statutes be held and put in execution, according to the said petition." *Id.*

But Charles I put this issue into hot debate after he ordered the detention of subjects who refused to loan the crown money to prosecute war. In *Darnel's Case*, detainees of the crown sought relief in habeas corpus. 1 Thomas Salmon, *A new Abridgement and Critical Review of the State Trials* 79 (London: William Mears, 1737). The detainees claimed that courts could acquire jurisdiction over cases where subjects are detained "*per speciale mandatum Domini Regis*" (by special order of the King), and that imprisonment under such an order without further, particular cause shown "was too general, and uncertain; for that it was not manifest, what kind of command that was." *Id.* They further claimed that "Nothing passes from the Crown without matter of record," and one could not be imprisoned or continued in prison on the mere verbal command of the King;

action in trespass would lie against those executing such command. *Id.* at 81. In response, the Attorney General particularly seized on the duty and prerogative of the crown to prevent the disclosure of state secrets:

> The King often commits, and shews no cause: if he does express the cause, indeed to be either for suspicion of felony, coining, or the like, the court might deliver the prisoner, though it was *per speciale mandatum Domini Regis*, because there is no secret in these cases; for with the warrant, he sends the cause of the commitment: but if there was no cause expressed, that court always remanded them. It was intended, there was matter of state, and that it was not ripe, or time for it to appear. . . He said, there were *Arcana Imperii*, which subjects were not to pry into. If the King committed a subject, and expressed no cause, it was not to be inferred from thence, there was no cause for his commitment: the course has always been, to say there was no cause expressed, and therefore the matter was not yet ripe; and thereupon the courts of justice have always rested satisfied, and would not search into it. In this case, the King was to be trusted: it was not to be presumed, he would do anything, that was not for the good of the kingdom.

Id. at 83. The Attorney General further showed that Edward Coke, who now argued against the King, was of a different mind when he was a judge on King's Bench. There he and his colleagues held that "it had been resolved, that the cause need not be disclosed, being *per mandatum concilii* as *Arcana Regni* [mysteries of the crown]." *Id*. at 86. The King ventured that "Explanations would hazard an encroachment on his prerogative," *id.* at 94, and "That if a man was committed by the commandment of the King, he was not to be delivered by a habeas corpus in that court, for they knew not the cause of his imprisonment." *Id*. at 84. Sergeant Ashley, a crown attorney, further argued against court jurisdiction over the detainees from a specific example concerning protection of state secrets:

> If a King employ an Ambassador to a Foreign Country or State, with instructions for his Negotiation, and he pursues not his Instructions, whereby Dishonour or Damage may ensue to the Kingdom; is not this Cause of Commitment? and yet the Particular of his Instructions and the Manner of his Miscarriage not fit to be declared in the Warrant to his Keeper, nor by him to be certified to the Judges, where it is to be opened and debated in Presence of a great Audience? I therefore conclude, That, for Offences against the State, in Cases of State Government, the King or His Council hath lawful Power to punish by

> Imprisonment, without shewing particular Cause, where it may tend to the disclosing of the Secrets of State Government.

3 Journal of the House of Lords, 1620-1628 (Ap. 19, 1628).

But crown abuse of the doctrine of reasons of state to detain subjects was recognized early on, with Sir Benjamin Rudyard reported declaiming in 1628 that "As for Intrinsecal Power and Reason of State, they were matters in the clouds, where he desired to leave them: only as to reason of state he would say, that in the latitude it had been used, it had eaten out, not only the laws, but all the religion of christendom." 7 *A Collection of State Trials and Proceedings Upon High Treason and Other Crimes and Misdemeanors From the Reign of King Edward VI to the Present Time* 91 (London: C. Bathurst, 1766).

In the Petition of Right of 1628, Charles grudgingly accepted the claim that arrests and detentions without showing legal cause were beyond the crown's power. Once the problem of disclosure of matters of state was separated from warrantless detention, the English courts adopted a position of virtually unfettered deference to crown claims, frequently noticing the continuation of prerogative power in matters concerning refusal to disclose information regarding matters of state.

In the 1688 *Trial of the Seven Bishops*, the court refused to require a witness to testify as to the events of a Privy Council meeting. 12 How. St. Tr. 183, 309-11 (1688). In *Layer's Case* (1722), counsel for a defendant charged with high treason insisted on having minutes of a Privy Council meeting read into the record in open court. Lord Chief Justice Pratt held that "I . . . asked Mr. Attorney General, whether he thought fit to consent to it; and without his consent we are of opinion, that they cannot be read . . . You cannot read the minutes taken against the king, because these matters are not ripe yet, nor to be discovered to the world." 16 How. St. Tr. 94, 223-224 (1722). In *Rex* v. *Watson*, a public official was asked to testify as to the accuracy of a plan of the Tower of

London, which had been purchased from a public vendor. Lord Ellenborough prevented the witness from answering, saying he thought "[i]t might be attended with public mischief to examine an officer of the tower as to the accuracy of such a plan." 32 How. St. Tr. 1, 389 (1817).

But the path was not always so clear for the assertion of privilege, and in some cases witnesses were made to answer and documents were ordered produced. For example, in the *Earl of Strafford's Trial* (1640), in the House of Lords, evidence of statements Strafford made in Privy Council were allowed in, whereupon Lord Clarendon opined: "The ruin that this last act [of producing this testimony] brought to the King was irreparable; for . . . it was matter of horror to the counsellors to find that they might be arraigned for every rash, every inconsiderate, every imperious expression or word they had used there." 3 How. St. Tr. 1351, 1442-43 (1640).

In the *Trial of Maha Rajah Nundocomar* (1775), the court called in a secretary to Governor General Warren Hastings in India to produce books of the Council to the East India Company. Hastings instructed the secretary to refuse delivery of the books to the court, asserting that they contained "secrets of the utmost importance to the interest, and even to the safety of the state." 20 State Trials 923, 1057 (1775). Unimpressed, the court said that it would be improper to subject the books to "curious and impertinent eyes; but, at the same time . . . [h]umanity requires [evidence in the hands of the state] should be produced, when in favour of a criminal, justice when against him." *Id.* The court ended by lecturing Hastings, saying that "where justice shall require copies of the records and proceedings, from the highest court of judicature, down to the court of Pie-Powder" magistrates have the power to compel disclosure. *Id.*

Several Scots Law cases demonstrate a marked deviation from deference to crown privilege concerning the production of documents. In *Stevens* v. *Dundas* (1727), the court allowed a diligence against the crown requiring the production of an information. 19 W.M. Morison, *Decisions of the Court of Sessions* 7905 (1804). And in *Leven* v. *Board of Excise*, the court granted a diligence for records in the face of objections that the "documents called for had come into their hands in their public capacity, they were bound to decline undergoing any examination on the subject." Faculty Decisions 17 (1812-1814), No. 165 (First Division 1814).

But in England, with the odd exception, courts uniformly accepted assertion of crown privilege with little inclination to investigate the grounds of such assertion. The apogee of reasoning concerning the privilege came in two cases. In *Beatson* v. *Skene* (1860), Chief Baron Pollock, for a unanimous panel of Law Lords, found: "We are of opinion that, if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice." 5 H. & N. 838, 853 (1860).

Then Pollock took up the crucial question of who is to have the final say on what constitutes the "public interest." He concluded that:

> The judge would be unable to determine [the question of public interest] without ascertaining what the document was, and why the publication of it would be injurious to the public service — an inquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against. It appears to us, therefore, that the question, whether the production of the documents would be injurious to the public service, must be determined, not by the Judge but by the head of the department having the custody of the paper; and if he is in attendance and states that in his opinion the production of the document would be injurious to the public service, we think the Judge ought not to compel the production of it.

Id. The opinion in *Beatson* was the controlling holding concerning crown privilege until the Law Lords took the matter up again in *Duncan* v. *Cammel, Laird* (1942). There, relatives of sailors killed in the sinking of the submarine *Thetis* sued the submarine's manufacturer and requested production of design documents and other papers. Law Reports, A.C. 624 (1942). Quoting *Attorney General*

v. *New-Castle-Upon-Tyne*, Law Reports, 2 Q.B. 384, 395 (1897), the court noted, "The law is that the Crown is entitled to full discovery, and that the subject as against the Crown is not. That is a prerogative of the Crown, part of the law of England, and we must administer it as we find it." Law Reports, A.C. at 633 (1942). In reaffirming the bright lines announced by Pollock in *Beatson*, the court found that "The reasons given by Pollock C.B., by Lord Dunedin and by Lord Kinnear cannot be gainsaid." *Id*. at 641. It went on to approvingly quote Lord Parker's observation in *The Zamora*, that "Those who are responsible for the national security must be the sole judges of what the national security requires." *Id.* (quoting *The Zamora*, Law Reports, 2 A.C. 77, 107 (1916)).

What is clear from this history concerning the handling of matters of state by English courts, is that the thread of prerogative is present in a nearly unbroken sequence over four centuries of court decisions. The crown's power to withhold information regarding matters of state is based in unreviewable prerogative rights, a trust reposed in the king and queen, and deference to ministerial power to determine what is in the public interest. There is no cognate in the United States Constitution for a power outside of law, for executive action that is immune to judicial examination of its lawfulness by right of an inherent, constitutionally undefined power.

English courts acted chiefly as arms of the executive branch, especially in matters concerning ministerial duties of the government, until the power of the crown became substantially supplanted in the 18th century. The Act of Settlement of 1701 envisioned a more defined separation of powers and sought to free both Parliament and judges from crown influence. Judges were to hold their offices during good behavior and were not removable at crown discretion. Clause 3 of the Act in part states: ". . . judges commissions be made *quamdiu se bene gesserint* [during good behavior] and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them." But the judiciary in England now fell prey to the centralized power of Parliament rather than that of the crown, and by the 19th century Parliament "exercised the ultimate authority over the whole judicial system." F.J.C. Hearnshaw, "Review of *Principles of British Constitutional Law* by Cecil S. Emden," 7 *Journal of Comparative Legislation & International Law* 265, 266 (3rd Ser. No. 4, 1925). Judges "moved from being lions under the throne to being lions under the mace." Robert Stevens, "Reform in Haste and Repent at Leisure: Iolanthe, the Lord High Executioner and *Brave New World*," 24 *Legal Studies* 1 (Mar. 2004), at 4. As barrister Robert Stevens recently noted:

> The judges in the common law courts were political appointees; the Chief Justices of these courts were expected to support the government and were often given peerages for that very purpose. They also sometimes sat in the Cabinet. The chief judge in the equity courts was the Lord Chancellor, who presided in the House of Lords in its legislative sittings and again sat in the Cabinet. It was not an arrangement likely to develop a system which saw the courts as an independent arm of government. Indeed, with a hereditary upper house, a lower house increasingly unrepresentative because of shifts of population, the undemocratic courts down to 1832, the year of the Great Reform Act, were best understood as part of the great *Curia Regis*, which, at least in reality, whatever the form, had survived from the Middle Ages.

Id. at 2-3.

In the United States, courts are not lions under the throne or the mace, but are both freed and bound to duty by a constitution substantially defined through separation of powers into independent institutions. The opinions in *Beatson* and *Duncan* are toothless mewing of well-kept cats, but their importation into United States law by the U.S. Supreme Court in *United States v. Reynolds*, 345 U.S. 1 (1953), jars with our Constitution and our history of an independent judiciary.

II. The Government Fails to Acknowledge in its Reliance on *United States* v. *Reynolds* (1953), the Damage Done to an Independent Judiciary and the Rule of Law.

In *United States* v. *Reynolds*, 345 U.S. 1 (1953), the Supreme Court for the first time recognized and upheld the State Secrets Privilege. Although the decision remains the principal citation for the Privilege, the circumstances of the case provide powerful evidence that it was poorly and unwisely decided and needs to be interpreted today in a manner that safeguards judicial independence and the rights of private litigants.

In *Reynolds*, three widows brought an action under the Federal Tort Claims Act to sue the government for negligence in the explosion of a B-29 bomber on October 6, 1948, over Waycross, Ga. The accident killed their husbands, who had served as civilian advisers to an Air Force project. As engineers, they provided professional assistance to the secret equipment tested on the flight, all of which was known to newspapers readers who learned of the crash the next day. Louis Fisher, *In the Name of National Security* 1-2 (2006). The widows requested several key documents, including the accident report and the depositions of three crew survivors. Under the Federal Tort Claims Act, Congress directed federal courts to treat the government in the same manner as a private individual, deciding the dispute on the basis of facts and with no partiality in favor of the government. The United States "shall be liable in respect of such claims . . . in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages." 60 Stat. 843-44, § 410(a) (1946).

Other than the exceptions listed in the Federal Tort Claims Act, Congress authorized courts to adjudicate claims against the government and decide them fairly in the light of available facts. Congress empowered the courts to exercise independent judgment. Disputes were to be decided on the basis of evidence with no preferential treatment granted to the government. There was no reason for judges to accept at face value a government's claim that an agency document requested by plaintiffs was somehow privileged, without the court itself examining the document to verify the government's assertion.

The *Reynolds* case was assigned to Judge William H. Kirkpatrick, Chief Judge of the Eastern District in Pennsylvania. The attorney representing the three widows submitted 31 questions to the government, requesting that it provide answers and submit copies of identified records and documents. The government responded to the interrogatories on January 5, 1950. Fisher, *In the Name of National Security*, at 31-35. The widows then moved to compel the government to permit them to inspect and copy the following documents: the report and findings of the official investigation of the B-29 crash and the three statements taken by the government of the surviving crew members. On January 25, the government offered five reasons for withholding the documents. The first: "Report and findings of official investigation of air crash near Waycross, Georgia, are privileged documents, part of the executive files and declared confidential, pursuant to regulation promulgated under authority of Revised Statute 161 (5 U.S. Code 22)." *Id.* at 36. The citation was to the Housekeeping Statute, which dates back to 1789 and merely directed agency heads to keep custody of official documents. It did not in any way authorize the withholding of documents from plaintiffs or the courts. *Id*. at 36, 44-48. The other four reasons offered for withholding the documents relied on hearsay rules. *Id*. at 36.

Prior to the district court's decision, several district and appellate courts had issued important rulings on access to government documents in cases involving military accidents. Federal judges were familiar with the arguments by the government that certain documents were too sensitive, privileged or secret to be shared with a private plaintiff. In such cases, the judges reasoned, the documents should be given to the court to independently determine and verify whether the government had accurately characterized the contents. *Id*. at 37-42. Although in one case the government declined to share "national security" documents with a district judge, it released the materials to an appellate court. *United States* v. *Haugen*, 58 F. Supp. 436 (E.D. Wash. 1944); *Haugen* v. *United States*, 153 F.2d 850 (9th Cir. 1946). In another case during this period, a district court relied on the sovereign's command *Soit droit fait al partie* (Let right be done to the party) and added: "But right cannot be done if the government is allowed to suppress the facts in its possession." *Bank Line* v. *United States*, 76 F. Supp. 801, 804 (D. N.Y. 1948); *see Bank Line Limited* v. *United States*, 68 F. Supp. 587 (D. N.Y. 1946), and *Bank Line* v. *United States*, 163 F.2d 133 (2d Cir. 1947).

Federal courts frequently reminded the government that under the Federal Tort Claims Act and the Suits in Admiralty Act, the government was placed in all respects on a par with private individuals in litigation. *See O'Neill* v. *United States*, 79 F. Supp. 827 (D. Pa. 1948); *Cresmer* v. *United States*, 9 F.R.D. 203 (D. N.Y. 1949). Courts advised the government that if it refused to produce documents requested by a private party, it would lose the case. *See United States* v. *Cotton Valley Operators Committee*, 9 F.R.D. 719 (D. La. 1949); *United States* v. *Cotton Valley Operators Committee*, 339 U.S. 940 (1950). In 1950, a federal district court told the government that under the Federal Tort Claims Act it was required to adjudicate disputes in an independent manner and to assure that plaintiffs have adequate access to documents to prepare their case: "It is not the exclusive right of any such agency of the Government to decide for itself the privileged nature of any such documents, but the Court is the one to judge of this when contention is made. This can be done by presenting to the Judge, without disclosure in the first instance to the other side, whatever is claimed to have that status. The Court then decides whether it is privileged or not. This would seem to be the inevitable consequence of the Government submitting itself either as plaintiff or defendant to litigation with private persons." *Evans* v. *United States*, 10 F.R.D. 255, 257-58 (D. La. 1950).

Guided by these lower court precedents, Judge Kirkpatrick decided on June 30, 1950, that the report of the B-29 accident and the findings of the Air Force's investigation "are not privileged." *Brauner* v. *United States*, 10 F.R.D. 468, 472 (D. Pa. 1950). The widows, he said, were entitled to have the documents produced. On July 20, he issued an order permitting the plaintiffs to inspect the requested documents and set a deadline of August 7 for the government to produce the documents. Fisher, *In the Name of National Security*, at 51. The government presented to Judge Kirkpatrick a number of letters, affidavits, and statements, explaining why the documents should not be released to the plaintiffs. *Id*. at 51-56.

On September 21, Judge Kirkpatrick issued an amended order directing the government to produce for his examination several documents "so that this court may determine whether or not all or any parts of such documents contain matters of a confidential nature, discovery of which would violate the Government's privilege against disclosure of matters involving the national or public interest." The documents included the accident report and statements of the three surviving crew members. *Id*. at 56. When the government failed to produce the documents for his inspection, he ruled in favor of the three widows. *Id*. at 56-57. As earlier cases had signaled, the government's refusal to produce requested documents — either to plaintiffs or to a trial court — always ran a risk. The court could simply decide in favor of the plaintiff.

In taking the case to the Third Circuit, the government relied in part on an English case decided by the House of Lords in *Duncan* v. *Cammell, Laird* (1942), which the government regarded to be particularly "authoritative." Brief of the United States, Reynolds v. United States, No. 10,483 (3d Cir. 1951), at 33. The First Lord of the Admiralty in an affidavit claimed privilege from disclosure on the ground that it would be injurious to the public interest. A footnote in the government's brief offered a lengthy quote from *Duncan*. *Id.* at 36 n.30. Just before the passage selected by the government, however, is a key passage the government conveniently omitted: "Although an objection validly taken to production, on the ground that this would be injurious to the public interest, is conclusive, it is important to remember that the decision ruling out such documents is the decision of the judge. Thus, in the present case, the objection raised in the respondents' affidavit is properly expressed to be an objection to produce 'except under the order of this honourable court.' It is the judge who is in control of the trial, not the executive." *Duncan* v. *Cammell, Laird*, Law Reports, A.C. 642 (1942).

When the Supreme Court overruled the Third Circuit, it relied in part on *Duncan*. *United States* v. *Reynolds*, 345 U.S. at 7, 8, nn. 15, 20. Less than two decades later, the House of Lords disowned *Duncan*. One judge said that in many cases, "much dissatisfaction" had been expressed against it, "and I have not observed even one expression of wholehearted approval." *Conway* v. *Rimmer*, A.C. 910, 938 (1968). Several judges pointed out that *Duncan* was clearly erroneous in describing Scottish law. *Id.* at 958, 960-61, 977.

On December 11, 1951, the Third Circuit upheld the district court's decision: "considerations of justice may well demand that the plaintiffs should have access to the facts, thus within the exclusive control of their opponent, upon which they were required to rely to establish their right of recovery." *Reynolds* v. *United States*, 192 F.2d 987, 992 (3d Cir. 1951). In tort claims cases, where the government had consented to be sued as a private person, whatever claims of public interest might exist in withholding accident reports "must yield to what Congress evidently regarded as the greater public interest involved in seeing that justice is done to persons injured by governmental operations whom it has authorized to enforce their claims by suit against the United States." *Id.* at 994.

In addition to matters of public law, the Third Circuit viewed the case from the standpoint of policy. To grant the government the "sweeping privilege", it claimed, would be "contrary to a sound public policy." *Id.* at 995. It would be a small step, the court said, "to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers." *Id.* The court drew from history to warn about perfunctory and mechanical deference to secrecy claims. Edward Livingston, a contemporary of James Madison, wrote: "No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin, and reduced to slavery, by suffering gradual impositions and abuses, which were imperceptible, only because the means of publicity had not been secured." *Id.* At the Virginia ratifying convention, Patrick Henry said that "to cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man and every friend to his country." *Id.*

The Third Circuit acknowledged that state secrets of a diplomatic or military nature had always been privileged from disclosure, but it was for that reason that the district judge directed that the documents be produced for the judge's personal examination in camera to protect the government from the disclosure of any privileged matter. *Id.* at 996. The Third Circuit rejected the government's position that it was within "the sole province of the Secretary of the Air Force to determine whether any privileged material is contained in the documents and . . . his determination of this question must be accepted by the district court without any independent consideration of the matter by it. We cannot accede to this proposition." *Id*. at 996-97. To hold that an agency head in a suit to which the government is a party "may conclusively determine the Government's claim of privilege is to abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution." *Id*. at 997.

The Third Circuit offered three reasons for rejecting the government's reliance on the decision by the British House of Lords in *Duncan*. First, it involved the plans of the submarine *Thetis* and military secrets. Second, it was a suit between private parties. Third, "whatever may be true in Great Britain the Government of the United States is one of checks and balances." *Id*. An independent judiciary is part of those checks, the court said, and neither Congress nor the executive branch "may constitutionally encroach upon the field which the Constitution has reserved for the judiciary by transferring to itself the power to decide justiciable questions which arise in cases or controversies submitted to the judicial branch for decision." *Id*.

Having lost in the district court and the Third Circuit, the government petitioned the Supreme Court for a writ of certiorari. After looking to history, practices in the states, and British rulings, the government for the first time began to press the State Secrets Privilege: "There are well settled privileges for state secrets and for communications of informers, both of which are applicable here, the first because the airplane which crashed was alleged by the Secretary [of the Air Force] to be carrying secret equipment, and the second because the secrecy necessary to encourage full disclosure by informants is also necessary in order to encourage the freest possible discussion by survivors before Accident Investigation Boards." Brief for the United States, United States v. Reynolds, No. 21, U.S. Supreme Court, October Term, 1952, at 11.

The fact that the plane was carrying secret equipment was known by newspaper readers the day after the crash. Fisher, *In The Name of National Security*, at 1-2. The fundamental issue, which the government repeatedly muddled, was whether the accident report and the survivor statements contained secret information. As it turns out, they did not. *Id.* at 166-69. In its brief, the government invoked "the so-called 'state secrets' privilege," claiming that the claim of privilege by Secretary of the Air Force Thomas Finletter "falls squarely" under that privilege for these reasons: "He based his claim, in part, on the fact that the aircraft was engaged 'in a highly secret military mission' and, again, on the 'reason that the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force. The airplane likewise carried confidential equipment on board and any disclosure of its mission or information concerning its operation or performance would be prejudicial to this Department and would not be in the public interest.'" Brief for the United States, United States v. Reynolds, No. 21, U.S. Supreme Court, October Term, 1942, at 42-43.

Nothing in this description by the government had anything to do with the *contents* of the accident report or the survivors' statements. The fact that the aircraft was engaged in a secret military mission and carried confidential equipment was publicly known the day following the crash. Had those documents been made available to the district court, it would have seen nothing that related to military secrets or confidential equipment. At various places the government's brief misled the Supreme Court on the contents of the accident report. It asserted: "to the extent that the report reveals military secrets concerning the structure or performance of the plane that crashed or deals with these factors in relation to projected or suggested secret improvements it falls within the judicially recognized 'state secrets' privilege." *Id*. at 45. "To the extent"? In the case of the accident report and the survivor statements, the extent was zero. For access to accident report, *see* pages 10a-68a of http://www.fas.org/sgp/othergov/reynoldspetapp.pdf.

On March 9, 1953, the Supreme Court ruled that the government had presented a valid claim of privilege. It did so without looking at the documents. Divided 6 to 3, the Court described a confused level of judicial supervision: "The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect." *United States* v. *Reynolds*, 345 U.S. at 8. If the government can keep the actual documents from the judge, even for in camera inspection, there is no basis for a judge to "determine whether the circumstances are appropriate for the claim of privilege." The court merely accepts at face value an assertion by the government, an assertion that in this case proved to be false. Nor is there any reason to regard in camera inspection as "disclosure." The Court reasoned that in the case of the privilege against disclosing documents, the court "must be satisfied from all the evidence and circumstances" before it decides to accept the claim of privilege. *Id.* at 9. Denied the actual documents, the judge has no "evidence" other than claims and assertions by self-serving statements from executive officials.

Finally, the Court cautioned that judicial control "over the evidence of a case cannot be abdicated to the caprice of executive officers." *Id.* at 9-10. If an executive officer acted capriciously and arbitrarily, a court would have no way of discerning that behavior unless it personally examined in camera the disputed documents. Without access to evidence, federal courts necessarily rely on vapors and allusions. Through the process adopted by the Court, judicial control was clearly "abdicated to the caprice of executive officers." The Court surrendered to the executive branch quintessential judicial duties over questions of privileges and evidence. The Court served not justice but the executive branch. It signaled that in this type of national security case, the courtroom tilts away from the private litigant and becomes a haven for executive power.

III. Questions of Privileges and Admissibility of Evidence are Inherently a Judicial, not an Executive, Determination.

Deciding questions of privileges and access to evidence is central to the conduct of a trial by the judge. In his standard treatise on evidence, John Henry Wigmore recognized the existence of "state secrets" but also concluded that the scope of that privilege had to be decided by a judge, not executive officials. He agreed that there "must be a privilege for *secrets of State, i.e.* matters whose disclosure would endager [sic] the Nation's governmental requirements or its relations of friendship and profit with other nations." Yet he cautioned that this privilege "has been so often improperly invoked and so loosely misapplied that a strict definition of its legitimate limits must be made." 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2212a (3d ed. 1940) (emphasis in original).

Wigmore considered the claim of state secrets as so abstract and useless that he divided it into eight categories, with the seventh category "a genuine *topical privilege* for facts constituting *secrets of State*, and this, by improper extension," has often been made to include an eighth category, an "anomalous *communications-privilege* for *communications by or to or between officials of the government*." *Id.* at § 2367 (emphasis in original). On the duty to give evidence, Wigmore was unambiguous: "Let it be understood, then, that there is no exemption, for officials as such, or for the Executive as such, from the universal testimonial duty to give evidence in judicial investigations." *Id*. at § 2370. An exemption from attendance in court "does not involve any concession either of an exemption from the Executive's general testimonial duty to furnish evidence or of a judicial inability to enforce the performance of that duty." *Id*. at § 2371.

Regarding access to official records, Wigmore remarked: "the *illegality* of removing such records . . . is no ground for refusing to receive them." *Id.* at § 2373 (emphasis in original). Moreover, copies of official records are admissible "whenever the original is not removable," and there is "the right of a citizen or taxpayer to *inspect official records* in their place of custody." *Id.* (emphasis in original).

Wigmore now came to the key question: Who should determine the necessity for secrecy? The executive or the judiciary? As with other privileges, he concluded it should be the court: "Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coördinate body of government share the confidence? The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege . . . Both principle and policy demand that the determination of the privilege shall be for the Court." *Id.* at § 2379.

The issues explored by Wigmore resurfaced in the late 1960s and early 1970s, when expert committees attempted to define "state secrets" and determine which branch should decide the scope and application of privileges in court. An Advisory Committee on Rules of Evidence, appointed by Chief Justice Earl Warren in March 1965, held its initial meeting and began work three months later. The committee consisted of 15 members including eight trial attorneys, the head of the Criminal Appeals Division of the Justice Department, law professors, and federal judges. In December 1968, the committee completed a preliminary draft of rules of evidence. Among the many proposals was Rule 5-09, covering "secrets of state," defined as "information not open or theretofore officially disclosed to the public concerning the national defense or the international relations of the United

States." 46 F.R.D. 161, 272 (1969). Nothing in that definition prevented the executive branch from releasing state secrets to a judge to be read in chambers. It merely restricted the disclosure of information *to the public*.

The committee recognized that the government "has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of substantial danger that the evidence will disclose a secret of state." *Id.* at 273. Drawing language and ideas from *Reynolds*, the committee said that the privilege may be claimed only by the chief officer of the department administering the subject matter that the secret concerned. That officer would be required to make a showing to the judge, "in whole or in part in the form of a written statement." The trial judge "may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon." *Id.* The judge "may take any protective measure which the interests of the government and the furtherance of justice may require." *Id.*

If the judge sustained a claim of privilege for a state secret involving the government as a party, the court would have several options. When the claim deprived a private party of "material evidence," the judge could make "any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action." *Id.* at 273-74. A note prepared by the advisory committee explained that the showing needed by the government to claim the privilege "represents a compromise between the complete abdication of judicial control which would result from accepting as final the decision of a departmental officer and the infringement upon security which would attend a requirement of complete disclosure to the judge, even though it be *in camera*." *Id.* at 274. Left unexplained was what would happen if a judge rejected the judgment of a department official. Could the document be read in chambers? Shared with plaintiff's attorney? Either way, the draft report placed final control with the judge, not the agency head.

Because of that feature and others, the Justice Department vigorously opposed the draft. It wanted the proposed rule changed to recognize that the executive's classification of information as a state secret was final and binding on judges. 26 Federal Practice & Procedure 423 (Wright & Graham eds. 1992). A revised draft, renumbering the rule from 5-09 to 509, was released in March 1972. It eliminated the definition of "a secret of state" and therefore had to strike "secret" from various places in the rule. The new draft rewrote the general rule of privilege to prevent any person from giving evidence upon a showing of "reasonable likelihood of danger that the disclosure of the evidence will be detrimental or injurious to the national defense or the international relations of the United States." 51 F.R.D. 315, 375 (1971). Final control remained with the judge.

In addition to opposition from the Justice Department, several prominent members of Congress voiced their objections, partly because of the legislative procedure used to adopt rules of evidence for the courts (giving Congress only 90 days to disapprove). Objections were aimed at Rule 509, which some lawmakers thought weakened the Court's decision in *Reynolds*. 117 Cong. Rec. 29,894-96 (1971). Deputy Attorney General Richard Kleindienst wanted the rule rewritten to recognize that the government had a privilege not to disclose "official information if such disclosure would be contrary to the public interest." *Id*. at 33,648. The Justice Department insisted that once a department official, pursuant to executive order, decided to classify information affecting national security, that judgment must be regarded as having "conclusive weight" in determining state secrets unless the classification was "clearly arbitrary and capricious." *Id*. at 33,652-53.

How would that procedure work? Which branch would decide that the classification was clearly arbitrary and capricious, and on what grounds? Would final judgment be left to the self-interest of the executive branch? Only a court could provide an effective, credible, and independent check, and to reach an informed conclusion the judge had to examine the document.

The Supreme Court sent the proposed rules of evidence to Congress on February 5, 1973, to take effect July 1, 1973. New language for Rule 509 included a redrafted definition of secret of state: "A 'secret of state' is a governmental secret relating to the national defense or the international relations of the United States." 56 F.R.D. 183, 251 (1972). Congress concluded that it lacked time to thoroughly review all the proposed rules of evidence within 90 days and vote to disapprove particular ones. It passed legislation to provide that the proposed rules "shall have no force or effect" unless expressly approved by Congress. 119 Cong. Rec. 3755, 7651-52 (1973); Act of March 30, 1973, Pub. L. 93-12, 87 Stat. 9 (1973). Approval never came. Among the rejected rules was Rule 509.

Congress passed the rules of evidence in 1975, including Rule 501 on privileges. It comes down squarely on the side of authorizing courts to decide the scope of a privilege. The rule covers all parties to a case, including the government. It does not recognize any authority on the part of the executive branch to dictate the reach of a privilege. There is no acknowledgment of state secrets. The only exception in Rule 501 concerns civil actions at the state level:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law *as they may be interpreted by the courts* of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

88 Stat. 1934 (1975) (emphasis added).

The legislative history of Rule 501 explains how and why the provisions on state secrets were deleted. H. Rept. No. 93-650, 93d Cong., 1st Sess. 8 (1973). When the bill reached the House floor, it came with a closed rule that prohibited amendments. The privileges covered by the rule (including government secrets, husband and wife, physician and patient, and reporters) were considered "matters of substantive law" rather than rules of evidence: "we were so divided on that subject ourselves, let alone what the House would be, that we would never get a bill if we got bogged down in that subject matter which really ought to be taken up separately in separate legislation." 120 Cong. Rec. 1409 (1974) (statement by Rep. Dennis). The Senate Judiciary Committee also reported on the fractious nature of the rule on privileges, including disputes over state secrets. S. Rept. No. 93-1277, 93d Cong., 2d Sess. 6 (1974). Under those cross-pressures, Congress abandoned Rule 509.

Executive officials who invoke the State Secrets Privilege often understand that the branch that decides questions of privileges and evidence is the judiciary, not the executive. On February 10, 2000, CIA Director George J. Tenet signed a formal claim of State Secrets Privilege in the case of Richard M. Barlow, adding: "I recognize it is the Court's decision rather than mine to determine whether requested material is relevant to matters being addressed in litigation." Declaration of Formal Claim of State Secrets Privilege and Statutory Privilege by George J. Tenet, Director of Central Intelligence, Richard M. Barlow v. United States, Congressional Reference No. 98-887X, U.S. Court of Federal Claims, at 7. That language stands as a model of executive subordination to the rule of law and undergirds the constitutional principle of judicial independence.

IV. Treating the State Secrets Privilege as an Absolute Bar on Access to Requested Documents Undermines the Integrity, Independence, and Reputation of the Federal Judiciary.

In *United States* v. *Reynolds*, the Supreme Court was misled by the government on the contents of the accident report and the statements of the three surviving crew members. In various statements and affidavits, the government suggested that those documents, requested by the three widows, contained state secrets. When one looks at the declassified documents today, no state secrets can be found. That issue was taken to the federal courts on a *coram nobis*, but the Third Circuit decided that the value that trumped all others is judicial finality. *Herring* v. *United States*, 424 F.3d 384, 386 (3d Cir. 2005). On May 1, 2006, the Supreme Court denied certiorari. *Herring* v. *United States*, *cert. denied*, 126 S. Ct. 1909, 74 U.S.L.W. 3618 (May 1, 2006).

The value given short shrift in this fraud against the court case is protecting the integrity, independence, and reputation of the federal judiciary. The Supreme Court in *Reynolds* accepted at face value the government's assertion that the accident report and survivors' statements contained state secrets. That assertion was false. By accepting the government's claim, and by not examining the documents, the Court appeared to function as an arm of the executive branch and declined to exercise independent judgment. When courts operate in that manner, litigants and citizens lose faith in the judiciary, the rule of law, and the system of checks and balances.

When the government invokes the State Secrets Privilege, courts have many effective methods to protect their integrity. They can advise the executive branch that if it persists in asserting the Privilege, even to the point of withholding requested documents from in camera inspection, it will lose the case. That was the position taken by the district court and the Third Circuit in *Reynolds*. It was the proper position and the Supreme Court would have protected its dignity and independence by following the same course. It failed to do so and paid a price. Telling the executive branch that it will lose a case applies to three categories of cases: When the government brings a criminal case, when it brings a civil case, and when it is a defendant as it was in the tort claims case of *Reynolds*.

The appropriate message to the executive branch in these cases: Refuse to release the documents and you lose.

In criminal cases, it has long been recognized that if federal prosecutors want to charge someone with a crime, the defendant has a right to documents to establish innocence. In *Reynolds*, the government's brief to the Supreme Court cited the trial of Aaron Burr in 1807 as an example when the government "refused to divulge, in response to subpoenas, confidential portions of documents in the possession of the executive." Brief for the United States, United States v. Reynolds, No. 21, U.S. Supreme Court, October Term, 1952, at 10-11. Later in the brief the government produced a list of "successful assertions of the [evidentiary] privilege," including the Burr trial. *Id*. at 24.

The facts are otherwise. Aaron Burr was charged with treason and faced the death penalty. As a consequence, the Jefferson Administration understood that he had a right to whatever documents were needed to clear his name. The presiding judge at the trial, Chief Justice John Marshall, stated his willingness to suppress certain documents upon learning "it is not the wish of the executive to disclose," but immediately added: "if it be not immediately and essentially applicable to the point." *United States* v. *Burr*, 25 Fed. Cas. 30, 37 (C.C.D. Va. 1807) (Case No. 14,692d).

Marshall realized that if he issued a subpoena to Jefferson for the letters, it might be interpreted as a sign of disrespect for the office of the presidency. However, Marshall was more concerned that his own branch would lose respect if it failed to give an accused access to information needed for his defense. Withholding documents in a criminal case would "tarnish the reputation of the court which had given its sanction to its being withheld." Were he a party to this withholding, Marshall said he would be compelled "to look back on any part of my official conduct with so much selfreproach as I should feel." *Id.*

Jefferson, after discussing in general his right to independently determine what papers might be released, assured the court of his "readiness under that restriction voluntarily to furnish on all occasions whatever the purposes of justice may require." He had given one letter to Attorney General Caeser Rodney to be taken to Richmond for the trial, and expressed "a perfect willingness to do what is right." *Id*. at 65. George Hay, one of the government attorneys handling the prosecution, thought there might be some matters in the letters "which ought not to be made public," but was willing to put them "in the hands of the clerk confidentially, and he could copy all those parts which had relation to the cause." *Id*. at 190. Hay stood ready to show the letters to Burr's attorneys for examination, and he "would depend on their candor and integrity to make no improper disclosures; and if there should be any difference of opinion as to what were confidential passages, the court should decide." *Id*. In the end, the jury found Burr not guilty on the charge of treason and not guilty on a second charge, a misdemeanor. Fisher, *In the Name of National Security*, at 212-20.

In the decade before *Reynolds*, the Second Circuit reviewed procedures for allowing access to documents in a criminal case. It disagreed that judicial deference to executive departments could allow the suppression of documents in a criminal proceeding that might "tend to exculpate." *United States* v. *Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944). In such situations the government must choose: "either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully." *Id*. If the government decided to prosecute someone, it must either release documents that are exculpatory or drop the case. Two years later, the Second Circuit reminded the government that when it "institutes criminal proceedings in which evidence, otherwise privileged under a statute or regulation, becomes importantly relevant, it abandons the privilege."

United States v. *Beekman*, 155 F.2d 580, 584 (2d Cir. 1946).

In criminal cases, the government can invoke its evidentiary privilege only by letting the defendant go free: "The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession." *Jencks* v. *United States*, 353 U.S. 657, 672 (1957).

In the Watergate Tapes Case, President Richard Nixon insisted that he had exclusive and final authority to decide which documents to release. The Supreme Court ruled against him. In a criminal case, where defendants need information to protect their rights in court, the President's general authority over agency information could not override the specific need for evidence. *United States* v. *Nixon*, 418 U.S. 683 (1974). As the Court explained: "The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." *Id.* at 709.

When the government initiates a civil case, defendants also have a right to gain access to federal agency documents. In *Nixon*, the Court noted: "We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation." *Id.* at 712 n.19. Still, lower courts have frequently told the government that when it brings a civil case against a private party, it must be prepared to either surrender documents sought by the defendant or drop the charges. Once a government official seeks relief in a court of law, the official "must be held to have waived any privilege, which he otherwise might have had, to withhold testimony required by the rules of pleading or evidence as a basis for such relief." *Fleming* v. *Bernardi*, 4 F.R.D. 270, 271 (D. Oh. 1941). To gain the relief it sought, the government must "comply with the conditions precedent to the granting of such relief and, to that extent, surrender the right of secrecy." The choice: Give up the privilege or abandon the case. *Id.* If the government fails to comply with a court order to produce documents requested by defendants, the court can dismiss the case. *United States* v. *Cotton Valley Operators Committee*, 9 F.R.D. 719 (D. La. 1949), *judgment aff'd*, 339 U.S. 940 (1950).

Similarly, in 1958, the Eighth Circuit dismissed a lawsuit brought by the Secretary of Labor after he refused to obey court orders directing him to produce for the defendants four statements taken by the Secretary's investigators. The government argued that the statements were privileged. To the court, the issue of privilege was one for the judiciary. *Mitchell* v. *Bass*, 252 F.2d 513, 517 (8th Cir. 1958). In 1961, the government lost a case when the National Labor Relations Board refused to permit testimony sought by a company charged with unfair labor practices. To the Fifth Circuit, "fundamental fairness" required that the company "be allowed to introduce testimony that may impeach the evidence offered against it. The N.L.R.B. cannot hide behind a self-erected wall evidence adverse to its interest as a litigant." *NLRB* v. *Capitol Fish Co.*, 294 F.2d 868, 875 (5th Cir. 1961). Responsibility for deciding questions of privilege "properly lies in an impartial independent judiciary — not in the party claiming the privilege and not in a party litigant." *Id.* A tax case in 1963 again illustrates the right of a private party to agency documents. It would be "unconscionable," said a district court, for the government to be permitted to prosecute a case "challenging its own prior determination of defendant's tax liability, and then invoke governmental or attorney-client privileges, or the attorney's work-product doctrine, to deprive the defendant of matters which might be material to its defense." *United States* v. *San Antonio Portland Cement Co.*, 33 F.R.D. 513, 515 (D. Tex. 1963). In camera inspection by the court showed that the documents did not reveal any military or state secret, but even the presence of that kind of material would not justify suing a private company on the basis of information that the government insists on keeping to itself. Other decisions underscore the principle that when the government brings a civil suit, it waives any privilege. *United States* v. *Gates*, 35 F.R.D. 524, 529 (D. Colo. 1964); *General Engineering, Inc.* v. *NLRB*, 341 F.2d 367, 376 (9th Cir. 1965).

In 2005, the Supreme Court reviewed a disturbing case that had been bouncing around the Tax Court for a number of years. Secrecy was practiced not within an executive agency but inside the judiciary. The case involved taxpayers who had been charged by the government with failure to report certain payments on their individual tax returns and with tax fraud. They had reason to believe that a report submitted by a special trial judge — a document publicly available in earlier years — had been withheld from them. This report concluded that the taxpayers did not owe taxes and that the fraud penalty did not apply. To the Supreme Court, the failure to disclose the special trial judge's report "impedes fully informed appellate review of the Tax Court's decision." *Ballard* v. *Commissioner*, 544 U.S. 40, 59-60 (2005). Of course, the practice of secret reports also denies private citizens the documents they need to prevail in court.

When a private party brings a case against the government, as in a tort claims action, the government may be put in the position of either releasing requested documents or losing the case. In *Reynolds*, both the district court and the Third Circuit told the government that if it insisted on withholding the accident report and the survivor statements, it would lose. Only at the level of the

Supreme Court was the government allowed to both withhold documents and prevail on the merits. The fact that the documents, once declassified, were shown to possess no state secrets produced a stain on the Court's reputation and a loss of confidence in the judiciary's capacity, or willingness, to function as an independent branch. A trial court must at least conduct in camera review to judge the government's claim of privilege, including state secrets. "Any other rule would permit the Government to classify documents just to avoid their production even though there is need for their production and no true need for secrecy." *American Civil Liberties U.* v. *Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980).

In 1977, private citizens sued the government after the arrest of over a thousand persons who demonstrated against the Vietnam War. The plaintiffs subpoenaed White House tapes. The D.C. Circuit rejected the position that the presidential privilege of confidentiality "was absolute in the context of civil litigation." *Dellums* v. *Powell*, 561 F.2d 242, 244 (D.C. Cir. 1977). Even though this was not a criminal case, the court reasoned that "there is also a strong constitutional value in the need for disclosure in order to provide the kind of enforcement of constitutional rights that is presented by a civil action for damages, at least where, as here, the action is tantamount to a charge of civil conspiracy among high officers of government to deny a class of citizens their constitutional rights and where there has been sufficient evidentiary substantiation to avoid the inference that the demand reflects mere harassment." *Id*. at 247.

CONCLUSION

In *United States* v. *Reynolds*, the Supreme Court had two valid avenues before it. It could have followed the path taken by the district court and the Third Circuit, deciding in favor of the three widows because the government declined to release the accident report and the survivor statements. As an alternative, it could have asked the government to submit the disputed documents to the district court for in camera review. Instead, the Court selected a third option that was the least justified, assuming on the basis of ambiguous statements produced by the government that the claim of State Secrets Privilege had merit. In so doing, it resorted to a jumbled reasoning process that, in the hands of lower courts, might injure the rights of private citizens and do damage to fair procedures and the rule of law. By failing to examine the documents, the Court took the risk of being fooled. As it turned out, it was, raising grave questions about the capacity of the judiciary to function as an independent, trusted branch in the field of national security.

The courts must now take care to restore confidence in the judiciary, in the sanctity of the courtroom, and the system of checks and balances. The State Secrets Privilege must be regarded as qualified, not absolute, for otherwise there is no adversary process in court, no exercise of judicial independence over what evidence is needed, and no fairness accorded to private litigants who challenge the government. Weaver & Pallitto, "State Secrets and Executive Power," at 102-07. In 1971, the D.C. Circuit stated that an "essential ingredient of our rule of law is the authority of the courts to determine whether an executive official or agency has complied with the Constitution and with the mandates of Congress which define and limit the authority of the executive. Any claim to executive absolutism cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative will." *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F.2d 788, 793 (D.C. Cir. 1971). To grant an executive official absolute authority over agency documents would empower the government "to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law." *Id.* at 794. In the Watergate cases, District Judge John Sirica in 1973 held that it was necessary for the Nixon Administration to produce presidential tape recordings to the court to be inspected in camera. He asked: "Would it not be a blot on the page which records the judicial proceedings of this country, if, in a case of such serious import as this, the Court did not at least call for an inspection of the evidence in chambers?" *In re Subpoena to Nixon*, 360 F.Supp. 1, 14 (D.D.C. 1973). His position found favor in subsequent rulings: "The Court, not the executive officer claiming privilege, makes the judgment whether to uphold or override the claim." *Kinoy* v. *Mitchell*, 67 F.R.D. 1, 17 (S.D.N.Y. 1975). There is no justification, either in law or in history, for a court to acquiesce to the accuracy of affidavits, statements, and declarations submitted by the executive branch. To defer to agency claims about privileged documents and state secrets is to abandon the independence that the Constitution vests in the courts, placing in jeopardy the individual liberties that depend on institutional checks.

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Respectfully submitted,

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